

Pilot Realty Co. v 1601 Rest. Corp.

2009 NY Slip Op 31316(U)

June 16, 2009

Supreme Court, New York County

Docket Number: 116434/08

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Index Number : 116434/2008
PILOT REALTY CO.
VS.
1601 RESTAURANT CORP.
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

FILED
JUN 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/16/09

JUDITH J. GISCHE, J.S.C. *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----x
PILOT REALTY CO.,

Plaintiff,

- against -

1601 RESTAURANT CORP,
MITCHELL SANDS,
MANUEL ORTIZ

Defendants

Decision/Order
Index No.: 116434/08
Seq. No.: 001

Present:
Hon. Judith J. Gische
J. C.

FILED
JUN 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers **Numbered**
Pltfs not. motion [d j/mt], affirm (HR), affid (YR), exhbts.....1

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for breach of a commercial building lease based on non-payment. Plaintiff, Pilot Realty Company ("Pilot Realty"), seeks a default judgment against defendants 1601 Restaurant Corporation ("1601 Restaurant") and Manuel Ortiz ("Ortiz") [CPLR § 2315]. Plaintiff also moves to amend the caption and withdraw its claims against Mitchell Sands [CPLR § 2035(b)]. The court grants the amendment of the caption at the outset. None of the defendants have answered the complaint or submitted any opposition to the motion.

Facts

This action is against a corporate defendant, 1601 Restaurant, and an individual, Ortiz. The action is for payments due under a commercial building lease (the "Lease") dated February 13, 1997 and entered into between Pilot Realty (as landlord) and 1601 Restaurant (as tenant). The Lease commenced on February, 13, 1997 and remained effective for ten years. Ortiz

personally guaranteed 1601's performance under the Lease pursuant to a Guaranty dated February 13, 1997.

Plaintiff filed the Summons and Verified Complaint on November 23, 2008. On December 19, 2008, The Summons and Verified Complaint were personally served on Donna Christie at the Department of State in Albany, New York, who is authorized by the Secretary of State to receive service on behalf of 1601 Restaurant [CPLR § 311(a)(1)]. Defendant 1601 Restaurant did not appear, answer the complaint, or obtain an order from the Court extending its time to do so. On February 4, 2009, plaintiff mailed an additional copy of the Summons and Complaint to 1601 Restaurant, complying with CPLR § 3215(g)(4)(i). Service of this additional notice occurred at least 20 days prior to entry of default judgment. Furthermore, plaintiff served notice of this motion upon 1601 Restaurant by mail on April 13, 2009 in accordance with CPLR § 2214(b). Service on 1601 Restaurant complies with applicable statutes and the Court has personal jurisdiction over such corporate defendant.

Plaintiff claims it served Ortiz with the Summons and Verified Complaint on December 22, 2008 by serving a person of suitable age and discretion residing at 228 Revere Avenue, Bronx, New York (the "Bronx Address") [CPLR § 308.2]. However, Ortiz's address is listed on the summons as 1970 Stacey Circle, Deltona, Florida (the "Florida Address"). Plaintiff also mailed a copy of this motion to Ortiz at the Florida Address. Ortiz's New York State driver license (annexed to Exhibit "A") lists a New York address of 226 Neptune Court, Bronx. Given the numerous addresses for Ortiz's residence and absent an explanation from plaintiff, the Court cannot conclude that the plaintiff properly served Ortiz with the summons and complaint. Therefore, without further proof and/or explanation, plaintiff is not entitled to entry of a default judgment against Ortiz at this time.

The Court will nonetheless consider the remaining requests for relief requested against 1601 Restaurant. Plaintiff's motion is supported by the sworn affidavit of Yolanda Rivera ("Rivera"), agent for the plaintiff and manager of the property under the Lease. A copy of the Lease entered into between Pilot Realty and 1601 Restaurant has been provided to the court.

In the complaint, plaintiff generally contends defendants failed to pay required monthly rental payments for April, 2006 through and including February, 2007 for a total amount of \$135,674.00 plus interest. Plaintiff acknowledges that defendants made a partial payment of \$31,859.36, leaving a balance of \$103,814.64 due plus interest. Plaintiff claims defendants owe the total amount of missed payments minus the partial payment, thereby totaling \$103,814.64 plus interest (first cause of action).

Rivera in her affidavit states facts that differ significantly from those asserted in the complaint. Rivera claims defendants failed to pay required monthly rental payments for April, 2004 through and including September, 2004, for a total amount of \$135,675.00. The affidavit claims no money was paid by defendants towards the balance of the debt.

Plaintiff also seeks from defendants reasonable attorneys' fees in an amount to be determined by the Court (second cause of action).

Discussion

Failure to answer a complaint constitutes an admission of the factual allegations therein, and any reasonable inferences made therefrom [Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984)]. A plaintiff must demonstrate it has a *prima facie* cause of action before it is entitled to default judgment [Gagen v. Kipany Productions Ltd., 289 AD2d 844 3d Dept 2001)].

Plaintiff's first cause of action is for breach of contract. A *prima facie* cause of action for breach of contract is established by: (1) the formation of a contract between the parties; (2) performance by the plaintiff; (3) failure to perform by the defendant; and (4) damage resulting from defendant's failure to perform [Furia v. Furia, 166 AD2d 694 (2d Dept 1990)]. The plaintiff fails to establish a *prima facie* cause of action for breach of contract because it offers insufficient evidentiary proof of both the time period of defendants' failure to perform and damages. Plaintiff, therefore, is not entitled to an entry of default judgment on the first cause of action. Since the second cause of action for legal fees is ancillary and dependent upon succeeding on the first cause of action, the second cause of action also fails.

Plaintiff's Verified Complaint and Affidavit in Support are inconsistent. Plaintiff's Verified Complaint claims defendants failed to pay monthly rent from April, 2006 through and including February, 2007. However, plaintiff's supporting affidavit claims defendants failed to pay monthly rent from April, 2004 through and including September, 2004.

The Court recognizes that the inconsistency may be due to a typographical error in the Affidavit in Support. The Verified Complaint and Notice of Motion both refer to the April, 2006 to February, 2007 period, whereas only the affidavit refers to the April, 2004 to September, 2004 period. Furthermore, the affidavit incorrectly claims the rental rate from April, 2004 to September, 2004 was \$12,334.00 per month, for a total of \$135,674.00. According to the Lease, the rental rate from April, 2004 to September, 2004 was \$11,188 per month, for a total of \$67,128.00. The period of April, 2006 to February, 2007, however, was subject to a rental rate of \$12,334.00 per month, for a total of \$135,674.00. These inconsistencies, however, need to be further explained and reconciled before a judgment can be entered.

As to insufficient evidentiary proof of damages, plaintiff's Verified Complaint and Affidavit in Support are again inconsistent. Plaintiff claims in the Verified Complaint defendants paid \$31,859.36 towards the balance of the unpaid rent for a total of \$103,814.64 in damages. However, plaintiff's supporting affidavit claims defendants paid no money towards the debt for a total of \$135,674.00 in damages. This also needs to be explained before a judgment can be entered.

Plaintiff has failed to furnish any documentary proof of defendants' actual dates of default or actual amount of default.

Accordingly, plaintiff's motion is granted in respect to amending the caption and withdrawing its claims against Mitchell Sands. Plaintiff's motion for a default judgment is denied in respect to the first and second causes of action.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that plaintiff's motion is granted to the extent of amending the caption and withdrawing its claims against Mitchell Sands; and it is further

ORDERED that plaintiff's motion for entry of a default judgment against defendants is denied in respect to its first and second causes of action, with leave to renew; and it is further

ORDERED that plaintiff has ninety (90) days to renew this motion upon proper proof and in accordance with this decision, or notify the court that it is abandoning this action. Plaintiff's failure to renew within the time period provided will result in immediate dismissal of this matter for unreasonably neglecting to proceed. CPLR § 3216.

Any requested relief not expressly addressed herein has been nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the Court

Dated: New York, New York
June 15, 2009

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
JUN 18 2009
COUNTY CLERK'S OFFICE
NEW YORK